

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____)	
CAPPSEALS, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	C. A. No. 05-11907-JLT
DIRECT MARKETING CONCEPTS,)	
INC., ITV DIRECT, INC., DIRECT)	
FULFILLMENT, LLC, DONALD)	
BARRETT, AND ROBERT MAIHOS,)	
)	
Defendant.)	
_____)	

**CAPPSEALS INC.'S CONCISE
STATEMENT OF MATERIAL FACTS SUPPORTING ITS
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Cappseals, Inc. ("Cappseals"), through counsel and pursuant to Local Rule 56.1, submits the following concise statement of material facts in support of its motion for summary judgment.¹

The Judgment In The Related Action.

1. On August 3, 2005, this Court issued the Judgment against ITV Direct, Inc. ("ITV") and Direct Fulfillment, LLC ("Direct Fulfillment") in favor of Cappseals in the amount of \$1,041,684.49. The Judgment was entered pursuant to the Court's July 20, 2005 Memorandum allowing Cappseals' Motion for Summary Judgment (the "Memorandum"). In the

¹ The facts described herein are generally supported by the Court's July 20, 2005 Memorandum allowing Cappseals' Motion for Summary Judgment (the "Memorandum") in the matter *ITV Direct, Inc. v. Healthy Solutions, LLC et al*, C.A. No. 04-CV10421-JLT (the "Related Action"). For the convenience of the Court, a true and accurate copy of the Court's July 20th Memorandum is attached to the Affidavit of Scott Silverman as **Exhibit A**.

Memorandum the Court determined that “there is no just reason to further delay payment for goods *delivered, accepted and re-sold*.”²

2. The Memorandum was based in part on stipulated facts with respect to shipments of a product to the defendants that was manufactured by Cappseals (the “Shipments”).³

DMC And ITV Ordered The Goods .

3. Between December 2003 and February 2004 ITV received six shipments of a health supplement called Supreme Greens with MSM (the “Product”) from a company named Healthy Solutions (d/b/a Direct Business Concepts). Memorandum, p. 1.

4. These shipments resulted from a “standing” purchase order numbered 1101 that was issued on November 21, 2003 by both ITV and the current defendant, Direct Marketing Concepts, Inc. (“DMC”), for the production and delivery of 50,000 units of the Product per week (“Purchase Order 1101”). Purchase Order 1101 specifically set forth the price (\$6.50 per bottle), type (capsules or powders), quantity of goods (50,000 per week), and method of cancellation (30 days notice).⁴

5. Pursuant to Purchase Order 1101, at the request of Healthy Solutions, Cappseals manufactured and delivered the Product to ITV. Joint Stipulations ¶7 (Silverman Aff., **Exhibit C**); Memorandum, p. 2.

Healthy Solutions Billed Both DMC And ITV For The Product.

6. Healthy Solutions issued six (6) invoices to DMC and ITV for the Shipments

² Memorandum, p. 6 (emphasis added). (Silverman Affidavit, **Exhibit A**.)

³ The Joint Stipulations are attached to the Affidavit of Scott Silverman as **Exhibit C**.

⁴ True and accurate copies of both purchase orders produced by ITV and Healthy Solutions in the related proceeding are attached as **Exhibit D** to the Affidavit of Scott Silverman.

under Purchase Order 1101. The invoices, numbered 21 through 26, were made in the amounts of: (1) \$300,078.00 for the December 29, 2003 shipment of the Product; (2) \$185,472.00 for the January 5, 2004 shipment of the Product; (3) \$323,712.00 for the January 14, 2004 shipment of the Product; (4) \$376,146.00 for the January 21, 2004 shipment of the Product; (5) \$318,216.00 for the January 29, 2004 shipment of the Product; and (6) \$318,240.00 for the February 5, 2004 shipment of the Product (collectively the “Invoices”). The total price of the goods delivered in response to Purchase Order 1101 and invoiced by Healthy Solutions was \$1,821,864.00. All of these Invoices referenced Purchase Order 1101.⁵

7. Neither DMC nor ITV paid any of the Invoices. Memorandum, p. 1.

Furthermore, Cappseals was never paid for the Product which it manufactured. Memorandum, p. 2.

DMC Carried The Revenue And Costs Of The Product On Its Own Books.

8. After several motions to compel in the Related Action (and a motion for sanctions) ITV produced an accounting report dated August 16, 2004 (the “Accounting Report”) disclosing the financial status of ITV and DMC as well as financial information relating to their sales of the Product.⁶

9. The Accounting Report indicates that the Product inventory was eventually transferred on the books and records to DMC which was credited for making payment for the Product to Healthy Solutions/Direct Business Concepts. See Accounting Report tab 6,

⁵ True and accurate copies of Invoices Nos. 21 – 26 are attached collectively as **Exhibit E** to the Affidavit of Scott Silverman.

⁶ A true and accurate copy of the Accounting Report is submitted herewith as **Exhibit F** to the Affidavit of Scott Silverman.

(Silverman Affidavit, **Exhibit F, tab 6**).

10. More specifically, on a report titled “*Direct Marketing Concepts, Inc., Supreme Greens Accounting, Costs of Supreme Greens Product Sold*” DMC provides the detail on \$4,647,698.61 in costs *it* incurred in acquiring the Product. Within this list are entries that identically match the Invoices identified above including the Invoice numbers, dates and the \$1,821,864.00 owed for shipments pursuant to Purchase Order 1101. See Accounting Report tab 6, (Silverman Affidavit, **Exhibit F, tab 6**). An excerpt from tab 6 is shown below:

<u>Trans #</u>	<u>Type</u>	<u>Date</u>	<u>Number</u>	<u>Name</u>	<u>Debit</u>
16,690	Bill	12/31/2003	21	Direct Business Concepts ⁷	\$300,078.00
16,691	Bill	01/09/2004	22	Direct Business Concepts	185,472.00
16,692	Bill	01/14/2004	23	Direct Business Concepts	299,520.00
16,692	Bill	01/14/2004	23	Direct Business Concepts	24,192.00
16,693	Bill	01/21/2004	24	Direct Business Concepts	345,600.00
16,693	Bill	01/21/2004	24	Direct Business Concepts	30,546.00
16,997	Bill	01/29/2004	25	Direct Business Concepts	288,000.00
16,997	Bill	01/29/2004	25	Direct Business Concepts	30,216.00
17,074	Bill	02/06/2004	26	Direct Business Concepts	288,000.00
17,074	Bill	02/06/2004	26	Direct Business Concepts	30,240.00

11. Similarly, ITV has produced another document from DMC’s accounting records that also identifies the costs DMC incurred for acquiring the Product. This report provides

⁷ Direct Business Concepts is a d/b/a for Healthy Solutions.

additional information including the fact that the debts owed pursuant to the Invoices (Numbers 21 through 26) were associated with Purchase Order 1101, and, a notation indicating the invoices were “not paid” by DMC.⁸ A true and accurate excerpt out of the report from DMC’s accounting records is shown below:

<u>Trans #</u>	<u>Type</u>	<u>Date</u>	<u>Number</u>	<u>Name</u>	<u>Debit</u>
16,690	Bill	12/31/2003	21	Direct Business Concepts	\$300,078.00
16,691	Bill	01/09/2004	22	Direct Business Concepts	185,472.00
16,692	Bill	01/14/2004	23	Direct Business Concepts	299,520.00
16,692	Bill	01/14/2004	23	Direct Business Concepts	24,192.00
16,693	Bill	01/21/2004	24	Direct Business Concepts	345,600.00
16,693	Bill	01/21/2004	24	Direct Business Concepts	30,546.00
16,997	Bill	01/29/2004	25	Direct Business Concepts	288,000.00
16,997	Bill	01/29/2004	25	Direct Business Concepts	30,216.00
17,074	Bill	02/06/2004	26	Direct Business Concepts	288,000.00
17,074	Bill	02/06/2004	26	Direct Business Concepts	30,240.00

12. Finally, the revenues and profits generated from sales of the Product have solely been attributed to DMC in its financial records. Accounting Report tab 1, (Silverman Affidavit, **Exhibit F, tab 1**).

13. In fact, the Accounting Report indicates that DMC generated revenues exceeding \$16 million associated with sales of the Product through June 2004. Accounting Report tab 14,

⁸ A true and accurate copy of the report from DMC’s accounting records produced by ITV with a bates label ITV00291 is submitted herewith as **Exhibit G** to the Affidavit of Scott Silverman.

(Silverman Affidavit, **Exhibit F, tab 14**).

14. This significant revenue has lead to net assets of \$4.6 million (approx.) for DMC as of June 2004. Accounting Report tab 14, (Silverman Affidavit, **Exhibit F, tab 14**).⁹

15. While DMC has generated significant assets through sales of the Product, at the same time, ITV has served as nothing more than a “pass-through.” The Accounting Report indicates that the strategy implemented by the defendants left ITV with a negative balance sheet, showing a deficit of \$93,450 as of June 2004. Accounting Report tab 15, (Silverman Affidavit, **Exhibit F, tab 15**).¹⁰

The Defendants Manipulate The Financial Assets Of ITV And DMC.¹¹

16. ITV’s general ledger shows that on average ITV recorded 398 transactions per month during May, June and July, 2005. From July 20, 2005 – the date of the summary judgment Memorandum – through the printing of the General Ledger on September 30, 2005 (2 ½ months) ITV recorded a *total* of 9 transactions. Five of these were transactions with DMC totaling \$360,000.¹²

17. ITV’s bank statements tell a similar story with it averaging \$1.8 million flowing in and out of its accounts during the months of May, June and July, 2005 whereas that number

⁹ Despite this Court’s ruling on Cappseals’ Motion for Post-Judgment Relief on October 24, 2005, the defendants have failed and refused to provide any up to date information relating to DMC’s current financial status.

¹⁰ Despite this Court’s ruling on Cappseals’ Motion for Post-Judgment Relief on October 24, 2005, the defendants have failed and refused to provide any up to date information relating to DMC’s current financial status.

¹¹ Many of the facts with respect to the defendants’ dissipation and transfer of assets are supported by the findings of the Court in the case of *Federal Trade Commission v. Direct Marketing Concepts, Inc. et al*, Civil Action No. 04-11136-GAO (the “FTC Action”). A true and accurate copy of the Preliminary Injunction Order issued in the FTC Action is attached to the Affidavit of Scott Silverman as **Exhibit H**

¹² The relevant portions of ITV’s general ledger are attached to the Silverman Affidavit as **Exhibit I**

dropped to \$100,000 in August.¹³

ITV And DMC Are Operated As A Single Entity.

18. While these accounting activities indicate a strategy of debt avoidance, the company's principal, Donald Barrett, confirmed the strikingly similar ownership and management structure between the related entities that contradicts any real corporate "separation."

A: I own a company called ITV Direct and Direct Marketing Concepts along with my business partner.

Q: What do you do for ITV Direct?

A: I host the infomercial aspect of the direct response business.

Q: Do you have any title for your work at ITV Direct?

A: My title is president and CEO.

Q: Are you a shareholder?

A: Yes, I am.

Q: What percentage of the shares do you own?

A: I believe fifty percent.

Q: You mentioned a business partner. Who is that?

A: His name is Robert Maihos, M A I H O S.

Q: What percentage of shares does he own?

A: The other fifty percent.

Q: What about Direct Marketing Concepts, what do you do for them?

A: The same thing.

Q: When you say "the same thing" would you describe your duties for me.

A: The Direct Marketing Concepts was the original company that we started. ITV Direct was a company that I started to actually produce the infomercials. Direct Marketing Concepts doesn't produce the infomercials any more, they are mainly the company that answers the telephones.

Q: Do you have a title at Direct Marketing Concepts?

A: It would be the same, president and CEO.

Q: Do you own some shares in Direct Marketing Concepts?

A: Exact same as Direct Marketing Concepts. Same as ITV Direct, rather.

Barrett Dep. pp. 6 – 7.¹⁴

¹³ ITV's bank statement for May, June, July and August 2005 are collectively attached as **Exhibit J** to the Silverman Affidavit.

19. Even Donald Barrett, the President of both ITV and DMC, mixed up the two companies. Mr. Barrett's confusion did not end with ownership issues, he was also incapable of distinguishing who his employees worked for, and, whether ITV or DMC paid their salaries:

Q: So you built the business from six telephones in the garage, and how large is ITV Direct now?

A: We have about 200 employees give or take.

Q: Is that ITV Direct, or is that Direct Marketing Concepts?

A: Both. I'm not sure which. I think everyone is paid out of Direct Marketing Concepts.

Barrett Dep. p. 13.

20. Testimony from Mr. Barrett's deposition also addresses the reasons for establishing ITV as well as the absence of any meaningful difference between ITV and DMC:

Q: I want to make sure I understand this. ITV Direct essentially produces the infomercials, and Direct Marketing Concepts answers the phone, places the orders, that sort of thing, is that a fair statement?

A: I really came up with ITV Direct because I liked the name more. I kind of weaseled, not weaseled but said ITV Direct, we can use that it for the production end of it and we'll use Directing Marketing Concepts for the bank end of the business. I liked the ITV name. It incorporated TV. I just liked the name better. That's frankly why I did it.

Barrett Dep. pp. 10-11.¹⁵

¹⁴ The relevant pages from the transcript of Mr. Barrett's August 23, 2004 deposition are attached to the Affidavit of Scott Silverman as **Exhibit K**.

¹⁵ Silverman Affidavit, **Exhibit K**.

21. In a recent lawsuit against the Federal Trade Commission (“FTC”) filed jointly by DMC, ITV and Donald Barrett on October 11, 2005 the parties state that the principal place of business for DMC and ITV is the same, 55 Cherry Hill Drive, Beverly Massachusetts, a fact that belies any argument that DMC and ITV are separate.¹⁶

Respectfully Submitted,
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By its attorneys,

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November 10, 2005

¹⁶ See *Direct Marketing Concepts, Inc., et al, v. the Federal Trade Commission*, Civil Action No. 05-11930GAO, Complaint, ¶¶ 2-3. A true and accurate copy of the Complaint is attached to the Silverman Affidavit as **Exhibit L**.

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing *Cappseals Inc.'s Concise Statement of Material Facts Supporting Its Motion for Summary Judgment* was served on the foregoing attorneys of record pursuant to Fed. R. Civ. P. 5 as follows:

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DATED: November 10, 2005